

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In re Petition of)		
)	MB Docket No. _____	
TIME WARNER ENTERTAINMENT)		
COMPANY, L.P.)	Honolulu	HI0005; HI0006
)	Kauai	HI0011
)	Hickam AFB	HI0043
)	Aliamanu	HI0058
For Modification of DMA)	Kaneohe Marine Corps	HI0066
Station KLEI-TV)	Pearl Harbor	HI0070
Mauna Kea Broadcasting Company)	Barking Sands Naval	HI0098
Kailua-Kona, Hawaii)	Kalaupapa	HI0107
)	Maui	HI0113

To: The Secretary
For: Chief, Media Bureau

PETITION FOR SPECIAL RELIEF

**TIME WARNER ENTERTAINMENT
COMPANY, L.P.**

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Date: July 13, 2012

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SUMMARY

Time Warner Cable respectfully requests that the DMA of television station KLEI-TV, Kailua-Kona, Hawaii ("KLEI"), be modified pursuant to Section 614(h)(1)(C) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") so as to remove the various unincorporated areas, incorporated municipalities and military installations (collectively, the "Communities") served by Time Warner Cable's systems located in Honolulu, Kauai, Kalawao, and Maui Counties (the "Systems"). As demonstrated herein, KLEI is not local to either the Systems or the Communities.

The Systems have not historically carried KLEI, and, according to available information, nor do other cable systems or MVPDs serving communities in Honolulu, Kauai, Kalawao, and Maui Counties. Further, KLEI's digital equivalent Grade B contour does not reach Honolulu, Kauai, Kalawao, or Maui County, and thus does not cover any of the Communities.

Additionally, the distances between Kailua-Kona and the Communities are in keeping with previous market modification decisions where the Bureau concluded that a station was not considered "local" to the communities at issue. Kailua-Kona also is separated from the Communities by vast expanses of ocean, thereby rendering air travel as the only practical means to reach the islands comprising Honolulu, Kauai, Kalawao, and Maui Counties from Kailua-Kona. Accordingly, this is a case where, as the legislative history to the 1992 Cable Act indicates, "the Commission may conclude that [the Communities] within a station's ADI may be so far removed from the station that [they] cannot be deemed part of the station's market."

Moreover, KLEI's programming consists of substantial amounts of "chestnut" re-runs of entertainment programs and infomercials, and its schedule is bereft of programs with any specific focus on particularized issues and events involving the Communities. In contrast, Time

Warner Cable's subscribers in the Communities already are extremely well-served by numerous broadcast and cable program services currently carried on the Systems. These services include a number of Oahu based broadcast stations that originate daily newscasts and carry area sporting events, as well as local offerings originated by Time Warner Cable itself.

Finally, KLEI has no presence in the Communities, as indicated by the fact that KLEI has no viewership in Honolulu, Kauai, Kalawao, and Maui Counties, and by its absence on the Commission's list of significantly viewed stations for those counties. Not surprisingly, given the vast distances and geographic barriers involved, there are no material economic, shopping or labor connections between Kailua-Kona and the Communities in Honolulu, Kauai, Kalawao, and Maui Counties. Thus, modification of KLEI's DMA to exclude the Communities will serve the goals of localism underlying the 1992 Cable Act's carriage requirements.

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To: The Secretary
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PETITION FOR SPECIAL RELIEF

Time Warner Entertainment Company, L.P. ("Time Warner Cable"), by its attorneys, and pursuant to Sections 76.7(a)(1) and 76.59(a) of the Commission's rules, submits this Petition for Special Relief to exclude Time Warner Cable's cable television systems (the "Systems") serving unincorporated areas, incorporated municipalities and military installations located in Honolulu, Kauai, Kalawao, and Maui Counties¹ (collectively, the "Communities") from the Designated Market Area ("DMA") of television station KLEI-TV, Kailua-Kona, Hawaii ("KLEI" or the

¹ Honolulu County is comprised largely of the island of Oahu; Kauai County is comprised of the islands of Kauai, Kaula, Lehua, and Nihau; Kalawao County consists of the Kalaupapa Peninsula on the island of Molokai; Maui County includes all of the islands of Maui, Lanai, and Molokini in addition to the remainder of the island of Molokai. KLEI is located in Hawaii County, which is comprised of the island of Hawaii. Time Warner Cable provides cable service to various communities in each of these five counties.

“Station”).² As demonstrated below, although KLEI is licensed to a community assigned to the Honolulu, Hawaii DMA, the Station and its city of license are geographically and economically removed from the Communities, and the Station fails to present programming tailored to the local needs and interests of any of the Communities. Thus, Time Warner Cable respectfully requests that the DMA with respect to KLEI be modified so as to relieve Time Warner Cable from any obligation to carry KLEI in the Communities.

I. BACKGROUND.

The Honolulu, HI DMA is the 72nd ranked television market and consists of the entire State of Hawaii. As a result, the DMA covers multiple islands spanning hundreds of miles in an area where the only practical mode of transportation from island to island is by air or boat. Full power commercial stations are licensed to Honolulu, Kaneohe and Waimanalo (located on the island of Oahu), Hilo, Kailua, and Kailua-Kona (located on the island of Hawaii), and Wailuku (located on the island of Maui). The stations affiliated with the big four networks (ABC, CBS, Fox, and NBC) located on Hawaii and Maui are actually satellite stations of the Oahu network affiliates. Time Warner Cable operates cable systems serving all or parts of each of the state’s five counties – Hawaii, Honolulu, Kauai, Kalawao, and Maui. KLEI is licensed to Kailua-Kona, located in Hawaii County on the island of Hawaii, and began operations as an independent station KSHQ in 1984. The station changed its call sign to KVHF in 1986 and to KLEI in 1992

² On June 13, 2012, KLEI’s licensee filed a must-carry Complaint (the “Complaint”), CSR-8658-M, against Time Warner Cable. Concurrently herewith, Time Warner Cable is filing an Opposition to KLEI’s Complaint. Since grant of this Petition would largely moot the Complaint, Time Warner Cable respectfully requests that the Commission decide both proceedings together, consistent with standard Commission practice in such cases. See, e.g., Frontier, A Citizens Communications Company, 18 FCC Rcd 9589 (MB 2003), recon. denied, 19 FCC Rcd 15439 (MB 2004); Adelphia Cable Partners, L.P. d/b/a Adelphia Cable Communications, 16 FCC Rcd 5328 (CSB 2001), recon. denied, 16 FCC Rcd 21508 (2001).

before becoming KLEI-TV in 2012. KLEI is currently carried by Time Warner Cable's system serving the western portion of Hawaii County.

II. KLEI HAS NO LOCAL NEXUS TO THE COMMUNITIES.

The legislative history of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")³ is replete with statements regarding the importance of locally-oriented programming.⁴ As the Commission has recognized, the purpose of the 1992 Cable Act's must-carry requirement is the "preservation of local television service and the local public interest programming provided by these broadcast stations."⁵ The statutory criteria governing market modification requests are also intended to reflect "the value of localism."⁶ In contrast, KLEI has no local nexus to the Communities. Thus, grant of this Petition would fulfill Congressional objectives by allowing the Commission to bestow the benefits of mandatory cable carriage only in those communities where a particular television broadcast station fulfills this overriding policy objective.

Furthermore, this Petition falls squarely within the scope of the waiver mechanism established by Congress in Section 614(h)(1)(C) of the 1992 Cable Act. That provision directs the Commission, in evaluating such waiver requests, to:

[A]fford particular attention to the value of localism by taking into account such factors as –

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

³ Pub. L. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 151 et seq.

⁴ See, e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. 56 (1992) ("House Report"), (quoting remarks of Alfred C. Sikes, Chairman, FCC, before the International Radio and Television Society, Sept. 19, 1991 at 6 (local news, information and other programming represents "the linchpin of localism" and the "'public interest' commitment")).

⁵ Home Shopping Station Issues, 8 FCC Rcd 5321, 5326 (1993) (emphasis added).

⁶ 47 U.S.C. § 534(h)(1)(C)(ii). See also Must Carry and Retransmission Consent, 8 FCC Rcd 2965, 2976 (1993) ("Report and Order"), recon. 9 FCC Rcd 6723 (1994).

(II) whether the television station provides coverage or other service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁷

As detailed by the discussion below, because KLEI is not local to the Communities, Time Warner Cable's Systems should be granted relief from mandatory carriage of KLEI.

A. KLEI Has No Record of Historic Carriage on the Systems.

The first factor under Section 614(h)(1)(C) requires an assessment of the historical carriage, if any, of the station by the cable system or systems serving the affected communities.⁸ Time Warner Cable's Systems do not currently carry KLEI and have never done so, as demonstrated by the channel lineups for the Systems, attached hereto as Exhibit A.⁹ This is because KLEI has historically been unable to deliver a signal of requisite quality to the Systems, coupled with the fact that the Systems carry numerous local broadcast stations airing programming tailored to the interests of viewers in communities in Honolulu, Kauai, Kalawao, and Maui Counties. Thus, according to 47 U.S.C. § 534(h)(1)(B)(iii), KLEI has never been a qualified "local commercial television station" on the Systems for must-carry purposes. In

⁷ 47 U.S.C. § 534(h)(1)(C)(ii). In 1999, the Commission added additional guidelines for market modification petitions. See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules, 14 FCC Rcd 8366 at ¶ 44 (1999).

⁸ 47 U.S.C. § 534(h)(1)(C)(ii)(I).

⁹ Attached as Exhibit B are an assortment of copies of relevant Hawaii specific pages from the Television and Cable Factbook going back to 1988, confirming that the cable systems serving Kauai, Maui, and Oahu have never carried KLEI. Television and Cable Factbook, No. 56 (1988), at D245-247; Television and Cable Factbook, No. 61 (1993) at D344-347; Television and Cable Factbook, No. 66 (1998), at D-327-328; Television and Cable Factbook, No. 71 (2003) at D-326-328; Television and Cable Factbook, No. 76 (2008), at D316-318.

addition, Hawaiian Telcom, the only other cable system serving Oahu, likewise has never historically carried KLEI.¹⁰ Furthermore, neither DirecTV nor Dish Network carries KLEI, although they do offer “local into local” carriage of Honolulu stations.¹¹ Such lack of carriage by any cable system or MVPD demonstrates that KLEI is not local to the Communities.¹²

B. KLEI Does Not Provide Local Service to the Communities.

The second statutory factor in a market modification analysis seeks to determine “whether the television station provides coverage or other service to such community.”¹³ According to the Commission’s Media Bureau (formerly the Cable Services Bureau), “this factor incorporates both technical service and programming service.”¹⁴ As demonstrated below, KLEI does not provide localized technical or programming service to any of the Communities.

¹⁰ See Hawaiian Telcom current Oahu channel lineup, attached as Exhibit C. Other than the Hawaiian Telcom system on Oahu, to the best of Time Warner Cable’s knowledge, there are no other competing cable systems serving any of the Hawaiian Islands.

¹¹ See Dish Network and DirecTV current Oahu channel lineups, attached as Exhibits P and Q, respectively.

¹² There are no other television stations licensed to Kailua-Kona, or to anywhere on the island of Hawaii, that are being or have ever been carried by Time Warner Cable’s Systems located in Honolulu, Kauai, Kalawao, and Maui Counties (or by Hawaiian Telcom for that matter). Thus, under the Commission’s standards, there is no issue of Time Warner Cable singling out KLEI for exclusion, nor do Time Warner Cable’s actions reveal any pattern of discriminatory conduct against KLEI. See, e.g., Greater Worcester Cablevision, Inc., 13 FCC Rcd 22220 at ¶ 17 (CSB 1998) (“Greater Worcester I”) (“In the instant case, however, no other station licensed to Norwell, Massachusetts is carried by Greater Worcester.”) This fact plainly distinguishes this case from a previous denial of a market modification on the Hawaiian Islands where the cable operator sought to exclude communities on the island of Kauai from the markets of two Honolulu stations while not seeking similar market modifications for other Honolulu stations that the cable operator wished to continue carrying. See Petition of G Force, L.L.C., 13 FCC Rcd 10386 (CSB 1998).

¹³ 47 U.S.C. § 534(h)(1)(C)(ii)(II).

¹⁴ Home Link Communications of Princeton, L.P., 13 FCC Rcd 1578 at ¶ 19 (CSB 1997); recon. denied, 14 FCC Rcd 9603 (1999).

1. **KLEI Does Not Provide Technical Service to the Communities.**

a. **KLEI's Predicted Digital Equivalent Grade B Contour Falls Short of the Communities Served by the Systems.**

A station seeking to demonstrate that it provides local service to a cable community from a technical standpoint must be able to place at least a Grade B coverage contour over that community, or at least be located close to the community in terms of mileage.¹⁵ After the digital transition, with the analog Grade B contour no longer in existence, the Commission has clarified that the 41 dBu digital noise-limited contour is the “functional equivalent” of the Grade B contour and should be used going forward.¹⁶

KLEI's predicted digital equivalent Grade B contour, which is depicted on the maps attached as Exhibit D hereto,¹⁷ does not cover any portion of Maui County (the closest of the counties at issue) and comes nowhere near the Honolulu, Kalawao, or Kauai Counties, and thus fails to reach any of the Communities. In particular, one map illustrates that all of the Communities located in Honolulu, Kauai, and Kalawao Counties are “off the charts” -- so remote that they do not even appear on the contour map at all. Accordingly, it is not surprising that the Station has historically failed to provide an adequate quality signal to the Systems.¹⁸ As the Commission has previously ruled, a lack of Grade B contour coverage over a cable system's communities is an important (and typically conclusive) factor in determining that the station does

¹⁵ See Report and Order, 8 FCC Rcd at 2977.

¹⁶ See Mountain Broadcasting Corporation, 27 FCC Rcd 2231, 2233 n.9 (MB 2012).

¹⁷ See, Exhibit D, Contour Maps, prepared by duTreil, Lundin & Rackley, Inc.

¹⁸ As part of its must-carry Complaint, KLEI asserts that it is willing to deliver a good quality signal to Time Warner Cable's headends serving the Communities in Honolulu, Kauai, Kalawao, and Maui Counties, but offers no details on how it would accomplish that feat. Nevertheless, a commitment to deliver a good quality signal by means other than off-air reception does not cure a station's failure to provide technical “coverage” within the meaning of Section 614(h)(1)(C)(II).

not provide local service to those communities.¹⁹ In this case, the Communities are not “local” to KLEI because the Station does not place a digital equivalent Grade B contour over them.

b. The Vast Distance Between the Station and the Communities Reinforces KLEI’s Lack of Service to the Communities.

The legislative history to the 1992 Cable Act provides that “the Commission may conclude that a community within a station’s ADI may be so far removed from the station that it cannot be deemed part of the station’s market.”²⁰ The chart attached hereto as Exhibit E demonstrates that the Communities are located between 66 miles and 293 miles from KLEI’s city of license, Kailua-Kona, Hawaii. These distances attenuate any meaningful ties, commercial or otherwise, between Kailua-Kona and the Communities. Further, the distances between Kailua-Kona and the Communities are in keeping with previous market modification decisions where the Bureau determined that a station was not local to the communities in question.²¹

c. Kailua-Kona and the Communities are Further Separated by Geographic Features.

The geography of the region serves to further dissipate any ties between KLEI’s community of license and Time Warner Cable’s Communities. As the map attached as Exhibit F demonstrates, Kailua-Kona, located on the island of Hawaii, is separated from the Communities, by vast ocean reaches.²² The Commission and the Bureau have repeatedly stated that political

¹⁹ See, e.g., Comcast Cable Communications, LLC, 26 FCC Rcd 14453, 14456-57 (MB 2011); Massillon Cable TV, Inc., 26 FCC Rcd 15221, 15225 (MB 2011); Time Warner NY Cable LLC, 22 FCC Rcd 16026, 16030 (MB 2007); Greater Worcester I at ¶¶ 18, 22.

²⁰ House Report at 97.

²¹ See, e.g., Greater Worcester I at ¶ 8 (communities between 39 and 70 miles from station’s city of license); Texas Cable Partners, L.P. d/b/a Paragon Cable, Order on Reconsideration, 15 FCC Rcd 21429 (CSB 2000) (communities located 41-45 miles from station); Mid-Hudson Cablevision, Inc., 15 FCC Rcd 5011 (CSB 2000) (communities located 31 to 70 miles from station).

²² See Exhibit F, Hawaii state map listing Kailua-Kona and the Communities. Please note that this map also includes the locations of the Time Warner Cable system headends on each island.

boundaries such as state borders, as well as natural boundaries, including major bodies of water (such as the large ocean expanses at issue here), are factors that further separate communities from television stations in market modification proceedings.²³ The Communities at issue here certainly fit these criteria, and thus they “cannot be deemed part of the station’s market.”²⁴

2. KLEI Airl No Programming Specifically Tailored to the Communities.

The 1992 Cable Act commands the Commission to “afford particular attention to the value of localism” when considering petitions to modify the market of television stations.²⁵ Given the geographic separation of KLEI from the Communities, it is not surprising that the Station’s program offerings do not focus on specific local needs and interests of the Communities. Instead, KLEI primarily offers ancient re-runs of entertainment programming, such as “Celebrity Bowling,” “Ozzie and Harriet,” “The New Zorro,”²⁶ “The Bill Cosby Show,”²⁷ and a healthy dose of infomercials.²⁸ The Commission has soundly rejected general interest programming such as that aired by KLEI as insufficient to satisfy the local programming

²³ See, e.g., Adelphia Cablevision Associates, L.P., 14 FCC Rcd 7686 (CSB 1999); Rifkin/Narragansett South Florida CATV Limited Partnership, d/b/a Gold Coast Cablevision, 11 FCC Rcd 21090 at ¶ 26 (CSB 1996) (“Gold Coast Cablevision”), recon. denied, 14 FCC Rcd 13788 (1999); Time Warner New York City Cable Group, 11 FCC Rcd 6528 (CSB 1996); Time Warner New York City Cable Group, 12 FCC Rcd 13094 (CSB 1996); recon. denied, 12 FCC 12262 (1997); Comcast of Central New Jersey, 13 FCC Rcd 1656 at ¶ 25 (CSB 1997) (“The communities are also geographically separated from WFMZ-TV’s city of license in terms of mileage by approximately 55 miles, are on the other side of the Delaware River from Allentown, and are in a different state.”)

²⁴ Id.

²⁵ 47 U.S.C. §534(h)(1)(C).

²⁶ The “New” Zorro, which first ran on The Family Channel from 1990 to 1993, should not be confused with the “old” Zorro, produced by Disney in the late 1950s.

²⁷ “The Bill Cosby Show,” which ran on NBC for two seasons (1969-1971), should be distinguished from the award-winning “Cosby Show,” which ran on NBC for eight seasons (1984-1992).

²⁸ See KLEI’s program lineup, attached as Exhibit G. Additionally, neither KLEI nor its programming are listed in the local newspapers serving the Communities, copies of which are attached as Exhibit H.

factor. For example, in its decision excluding Greater Worcester Cablevision's Massachusetts communities from the ADI of station WGOT (now WNEU), Merrimack, NH, the Bureau concluded:

[w]e find that the majority of [the station's] programming is general in nature and not specifically targeted to the cable communities at issue. . . . Nothing presented by [the station] shows that its program length presentations, while acquired by local business organizations, consist of programming directed particularly toward the designated communities served by the Systems.²⁹

Likewise, as the Commission has previously stated in rejecting such generic syndicated programming as not being local to the communities sought to be excluded, "those offerings may have some potential general interest to the cable communities, but with no specific ties to the communities at issue in this matter."³⁰

Moreover, the programming that the Station considers "local" is almost exclusively focused on the island of Hawaii, and has little to no nexus to the Communities. For instance, the program "Native Ways" focuses on events or concerns on the island of Hawaii such as the Hilo powwow and a dance contest in Kona.³¹ Similarly, "Talk Story Hawaii" highlights events on the Island of Hawaii like the Kona Coffee Expo and Kona Christmas parade.³² The Station's news show, "KLEI News," which airs for a mere five minutes Monday through Friday, is

²⁹ Greater Worcester Cablevision, 12 FCC Rcd 17347 at ¶ 19 (CSB 1997) ("Greater Worcester II"). See also TKR Cable Company, 12 FCC Rcd 8414 (CSB 1997) ("we find that the majority of the station's programming is of general interest, rather than specifically tailored to TKR's cable communities"); recon. denied, 14 FCC Rcd 9603 (1999); Home Link Communications of Princeton, L.P., 13 FCC Rcd 1578 at ¶30 (CSB 1997) ("the majority of programming involved is of general interest rather than specifically targeted to the communities here involved and does not serve, in terms of scope of the markets involved, to warrant inclusion of the communities involved"); recon. denied, 14 FCC Rcd 9603 (1999).

³⁰ Greater Worcester I at ¶ 19.

³¹ See Native Ways, KLEI, <http://www.klei.tv/local-shows/native-ways>.

³² See Talk Story Hawaii, KLEI, <http://www.klei.tv/local-shows/talk-story-hawaii>.

described by the Station as “Local Big Island News.”³³ In sum, because KLEI does not provide local service to the Communities, it fails prong II of the Section 614(h) test.

C. Other Oahu Based Stations Provide an Abundance of Local Coverage to the Communities.

The Commission has recognized that “[w]here a cable operator is seeking to delete a station’s mandatory carriage rights in certain communities, the issue of local coverage by other stations becomes a factor which we will give greater weight than in cases where a party is seeking to add communities.”³⁴ In contrast to KLEI’s total absence of local programming targeted to the Communities, Time Warner Cable’s Systems provide extensive local programming on a regular basis. On the Systems serving Honolulu, Kauai, Kalawao, and Maui Counties, Time Warner Cable carries the following stations: KAAH (Honolulu and Maui only), KALO (Honolulu only), KBFD, KFVE, KGMB, KHET, KHNL, KHON, KIKU, KITV, KPXO (Honolulu only), KWHE (Honolulu only), and KWHM (Maui only), each of which air local news, sports and weather programs that are designed to address the unique interests of residents of the Communities.³⁵

Perhaps the best evidence of the extent to which a station endeavors to provide programming specifically tailored to the communities within its service area can be found in the quarterly issues/programs lists required to be maintained in a station’s public file pursuant to Section 73.3526 of the FCC rules.³⁶ Accordingly, attached are examples of local programming reported in the issues/programs lists for the first quarter of 2012 by (1) KHNL (Exhibit I), (2)

³³ See KLEI, <http://www.klei.tv>.

³⁴ See, e.g., Dynamic Cablevision of Florida, Ltd. et al., 11 FCC Rcd 9880 at ¶ 21 (CSB 1996), recon. denied, 14 FCC Rcd 13783 (1999); Adelphia Cable Partners, L.P., 13 FCC Rcd 4047 at ¶ 22 (CSB 1997), recon. denied, 14 FCC Rcd 13783 (1999).

³⁵ See Exhibit A.

³⁶ 47 C.F.R. § 73.3526.

KGMB (Exhibit J), (3) KFVE (Exhibit K), (4) KHON (Exhibit L), and (5) KITV (Exhibit M).

Unlike KLEI, each of these stations broadcasts significant, substantial local programming that is of specific interest to Time Warner Cable subscribers in the Communities. Also unlike KLEI, these stations are also listed in the Oahu Advertiser, the Maui News, the West Hawaii Today, and the Kauai Times, the local newspapers serving the Communities.³⁷

Also available on the Systems are the following local offerings that Time Warner Cable originates: (a) the 24-hour locally produced programming channel OC16, which provides weather updates every 10 minutes, hourly highlights of cultural events and morning and afternoon rush hour traffic reports; and (b) the Hawaiian specific local sports programming channel OC16 Sports TV, which highlights sporting events from the University of Hawaii, as well as other local schools.³⁸

As demonstrated by the foregoing, Time Warner Cable's subscribers are already well served with an abundance of local programming broadcast by the truly local television stations carried on the Systems. In contrast, KLEI's generic programming does not serve the local needs and interests of residents of the Communities at all, let alone in a way that is not already being met by the numerous more proximate stations carried by the Systems.

D. KLEI Has No Viewership in the Communities.

According to the Commission,

The final factor concerns viewing patterns in the cable community in cable and noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful.³⁹

³⁷ See Exhibit H. See, e.g., Time Warner NY Cable LLC, 22 FCC Rcd 16026, ¶ 5 (MB 2007) (noting that station WGGN was not listed in the local newspaper of certain communities in the Cleveland DMA that were ultimately modified out of WGGN's market).

³⁸ See <http://www.oc16.tv/>.

³⁹ Report and Order at ¶ 47.

Under this standard, it is readily apparent that KLEI has no presence in Time Warner Cable's Communities. As set forth in the attached Declaration from Gladys T. Yu-Principe, Senior Research Manager for Time Warner Cable Media, Nielsen data confirms that KLEI has *no reportable viewing* in the counties of Honolulu, Kauai, or Maui.⁴⁰ This is clear evidence that KLEI does not have substantial viewership by residents in any of the Communities. Indeed, it is unlikely that KLEI has any viewership outside of its service contour, particularly in the Communities at issue here. As the Bureau similarly decided in granting TCI Cablevision of Colorado's request to exclude communities from KSBS-TV's television market, "[w]e find that the clear absence of any viewing of KSBS-TV in the Denver area lends strong support toward the requested market modification request."⁴¹

As the Bureau has stated, and as is certainly the case here, distance and geographic factors "attenuate[] the local ties the station might have to the cable communities and helps explain why the station's viewership is too low to be reported."⁴² KLEI's lack of viewership in the Communities supports the finding that Time Warner Cable has already established herein -- the Station's DMA for mandatory carriage purposes cannot possibly be defined to include the Communities. Further, given the Station's nonexistent viewership in the Communities, it is not surprising that KLEI does not appear on the Commission's list of significantly viewed stations for Maui County or Honolulu County.⁴³ Nor is it surprising that, as indicated above, the

⁴⁰ See Exhibit N. Nielsen does not separately report ratings for Kalawao County. Because Kalawao County is located entirely on the island of Maui, its viewership is likely to mirror that of Maui County.

⁴¹ TCI Cablevision of Colorado, 11 FCC Rcd 6109 at ¶ 18 (CSB 1996).

⁴² Comcast Cablevision of Monmouth County, 11 FCC Rcd 4226 at ¶ 15 (CSB 1996).

⁴³ See Federal Communications Commission, Significantly Viewed List, <http://transition.fcc.gov/mb/significantviewedstations120611.pdf>. Neither Kalawao nor Kauai County is included on the FCC's significantly viewed list.

Station's program offerings are not listed in the local newspapers available to the subscribers of Time Warner Cable's Systems serving the Communities.

E. There Are No Material Economic, Shopping or Labor Connections Between Kailua-Kona and the Communities.

The geographic separation between Kailua-Kona and the Communities naturally results in a lack of business and economic connections, including shopping and labor patterns, between them. For example, Time Warner Cable is unaware of any residents of Kailua-Kona who regularly shop in any of the Communities or *vice versa*, which is not surprising given the extensive distance and geographic barriers involved. Commuting patterns further reflect the lack of economic ties between Kailua-Kona and the Communities as they are on entirely different islands, and there are no commuter rail lines, bus links or highways between them. Indeed, a trip between Kailua-Kona and any of the Communities would be a major undertaking, likely involving air travel. This is borne out by hard commuting data from the US Census Bureau, which indicates that of Honolulu County's 953,207 residents, only 734 work (.08%) in Hawaii County; of Maui County's residents, only 48 work (.03%) in Hawaii County; and of Kauai County's 67,091 residents, only 33 work (.05%) in Hawaii County.⁴⁴ These *de minimis* figures confirm that there is no economic nexus between Kailua-Kona and the Communities.

As the Bureau has previously stated, "[t]he ADI market change process incorporated into the Communications Act, however, is n[ot] intended to be . . . a vehicle for broadcast stations to reach service areas that otherwise they could not serve."⁴⁵ The Commission and the Bureau have also repeatedly noted, "the broadcast signal carriage rules were not intended to transform a station with a restricted market and service area into a regional super-station that must be

⁴⁴ See Exhibit O, 2000 Census County to County Worker Flow Data for Hawaii Counties, available at <http://www.census.gov/population/www/cen2000/commuting/#HI>. There is no Census County to County Worker Flow data available for Kalawao County.

⁴⁵ Greater Worcester I at ¶ 16.

automatically carried in every single community in an ADI. . . .”⁴⁶ Likewise, as the 1992 Cable Act’s legislative history provides,

The FCC may make an adjustment to include or exclude particular communities from a television station’s market consistent with Congress’ objective to ensure that television stations be carried in the areas which they serve and which form their economic market.⁴⁷

In short, the Communications Act is intended to ensure that a television station has carriage rights throughout its true local service area; it is not intended to be a tool for broadcasters to maintain such rights in areas for which no local nexus to the station exists, as is the case here. In particular, despite the fact that KLEI’s signal contour fails to cover the entire island of Hawaii (including Hilo, the largest city), Time Warner Cable does not object to carrying KLEI throughout all of Hawaii County so long as KLEI fulfills its obligation under 47 C.F.R. § 76.61(a) to provide a good quality signal to Time Warner Cable’s headend located in the eastern part of Hawaii County. However, KLEI cannot be allowed to bootstrap carriage in Hawaii County to achieve regional super-station status through distribution state-wide, including in the Communities in Honolulu, Kauai, Kalawao, and Maui Counties where KLEI has no local nexus.

CONCLUSION

Must-carry rights were given to qualified commercial television stations in order to support broadcast programming that is local in origination and focus. Time Warner Cable’s Petition should be granted because it satisfies the criteria set forth in the 1992 Cable Act. In particular, KLEI is geographically removed from the Communities, and clearly does not provide local programming service to them, in contrast to the local stations carried on the Systems. In

⁴⁶ See, e.g., Brownwood Cable Television Service, Inc., 15 FCC Rcd 19636 at ¶ 13 (CSB 2000) (quoting Time Warner Entertainment-Advance/Newhouse Partnership, 11 FCC Rcd 6541 at ¶ 25 (CSB 1996)); Gold Coast Cablevision at ¶ 26.

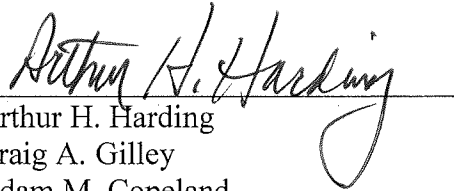
⁴⁷ House Report at 97 (emphasis added).

addition, KLEI has not been historically carried on the Systems and there is no record of any viewership of KLEI in the Communities. The facts demonstrated herein fall squarely within the parameters for finding that the Communities are "so far removed from a station that [they] cannot be considered part of the station's market." Therefore, the Commission should similarly grant Time Warner Cable's Petition to exclude the Communities from KLEI's DMA.

The undersigned verify that they have read the foregoing Petition and, to the best of their knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

Respectfully submitted,

**TIME WARNER ENTERTAINMENT
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Its Attorneys

Date: July 13, 2012

DECLARATION

I, Michael I. Goodish, do hereby declare and state under penalty of perjury as follows:

1. I am the Vice President of Networking & Technical Quality for Time Warner Cable with responsibility over Time Warner Cable's Hawaii cable systems.
2. I have read the foregoing Petition for Special Relief ("Petition"). With respect to statements made in the Petition, other than those of which official notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge, information, and belief.

7/11/12
Date

Michael I. Goodish
Michael I. Goodish